

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

MORAN TOWING OF PENNSYLVANIA, INC.

Employer/Petitioner

and

Case 4–RM–1254

SEAFARER’S INTERNATIONAL UNION OF
NORTH AMERICA, ATLANTIC, GULF LAKES
AND INLAND WATERS DISTRICT

Union Involved

AMERICAN MARITIME OFFICERS

Union Involved

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Unions Involved are labor organizations within the meaning of Section 2(5) of the Act.
4. The Employer/Petitioner operates a marine transportation business in the Port of Philadelphia. American Maritime Officers (AMO) represents a unit of Engineers who work on the Employer’s tugboats, and the Seafarer’s International Union Of North America, Atlantic, Gulf Lakes and Inland Waters District (SIU) represents a unit of the Employer’s Mates and Deckhands. The Employer contends that a “de facto merger” of the Engineer and Deckhand

positions gives rise to a question concerning representation, and that the only appropriate unit consists of all of the Employer's nonsupervisory tugboat employees. The AMO and SIU each take the position that the petition should be dismissed, contending that there is no question concerning representation because the units have not merged and because they have not demanded recognition in the unit the Employer claims is appropriate.¹

The Employer operates four tugboats on the Delaware River between Trenton, New Jersey and Baltimore, Maryland. Each tugboat contains a crew consisting of the Captain, a Mate, an Engineer, and a Deckhand. In total, the Employer employs seven Mates, seven Engineers, and seven Deckhands.

Crew Members' Responsibilities

The Captain has the ultimate responsibility for the safe operation and management of the vessel and has the authority to discharge, discipline, and assign work to the other crew members. Captains are not represented by any union. They are required to have a 1500 Ton Coast Guard License.

The Mate oversees maintenance and repair work on the vessel and ensures that it is properly provisioned and operable. When on watch, the Mate, like the Captain, is responsible for the safe operation and navigation of the vessel. Mates are required to hold a 500 Ton Coast Guard License.

The Engineers perform maintenance and basic repair work on the engines and auxiliary equipment and are responsible for housekeeping in the engine room and ensuring that the vessel has sufficient engine room consumables, such as oil and water. The Engineers are in charge of maintaining generators, ensuring that fuel valves are properly secured, and contacting on-shore personnel concerning engine equipment problems. They also are involved in the vessel's preventive maintenance process. During towing operations, Engineers may be required to serve as lookouts, especially during periods of restricted visibility or maneuverability, but their primary responsibility is to maintain the engine room. They are generally in charge of fuel transfer operations, subject to the Captains' overall authority. They also handle lines on deck. Engineers are required to possess a valid license as a "Chief Engineer 4,000 HP or greater."

The Deckhand is an entry-level position, which usually leads to promotion either to a Mate or Engineer position, depending on the individual's choice of career path. The Deckhand's responsibilities include handling lines on deck, cleaning the vessel, assisting the Engineer in the engine room with tasks such as changing oil filters, performing maintenance and light repair work, and conducting safety and security rounds throughout the vessel. At times, Deckhands may start and stop the engine. Deckhands are required to obtain a Merchant Mariners Document.

¹ SIU further contends that if an election is ordered, the ballot should list the Unions Involved as the only choices and should not include a "No Union" choice.

Deckhands and Engineers perform some of the same job duties including cooking, acting as lookouts, standing watch, performing safety inspections, handling lines, and assisting with docking procedures. During especially busy times, such as during docking operations, all members of the crew work together performing all of the necessary tasks.

When a tugboat is on duty, the crew lives on the vessel.² Each crew member has his own room, and all employees have access to a common area consisting of a kitchen, dining room, and television room. The Employer conducts safety meetings and training sessions for the entire crew in the common area. The tugboats sometimes operate 24 hours a day, and two members of each crew work alternating six-hour shifts.

From time to time, the Employer needs to temporarily replace Engineers who are unavailable for work. In these situations, the Employer contacts the AMO hiring hall, but if no Engineers are available from there, the Employer will ask its off-duty Engineers to fill in. If they decline, the Employer will request Deckhands to work as relief Engineers.³ When Deckhands fill in for Engineers, they remain covered by the SIU collective bargaining agreement but are paid at the Engineer wage scale set forth in the AMO contract.

The Parties' Negotiations

The collective bargaining agreements between the Employer and the Unions Involved each expired on April 30, 2001, but the parties mutually agreed to extend them. On April 30, 2002, the extensions expired, and the parties have been operating without agreements since that time.

The parties began negotiating new collective bargaining agreements in February 2002. Paul Swenson, the Employer's chief negotiator, testified that its chief competitor's collective bargaining agreements place the Employer at a severe competitive disadvantage because they allow for less than a four-man crew.⁴ In order to compete more successfully, the Employer proposed to both unions that a "Deck Utility" position be created, which would combine the Deckhand and Engineer jobs and would allow the Employer to operate with two or three person crews. Under its proposal, the Employer would draw from existing Engineers and Deckhands to fill this new position.

After some nine months of negotiating, the Employer and the SIU tentatively agreed on a proposal to create the Deck Utility position. In a letter to the SIU dated October 10, 2002, Swenson confirmed a prior understanding that the SIU and the Employer had "agreed in principle to the new deck-utility combination position provided it is an SIU, not AMO, position." The letter further stated that the Employer would pursue with the Board the issue of whether the matter raised a question concerning representation.

² Two of the tugboats operate two weeks on duty and one week off; the other two tugboats alternate weeks on and off duty.

³ The record shows only two dates on which a Deckhand filled in for an Engineer, one of which was for an eight-hour period. It is not clear whether Deckhands have served as relief Engineers on other occasions.

⁴ The Employer's chief competitor is McAllister Towing. The Unions Involved represent units of McAllister Towing's employees.

The Employer also proposed the creation of a Deck Utility position to the AMO. The AMO initially rejected this proposal completely but later offered that the position be shared equally between the two unions. The Employer declined the AMO's offer and subsequently withdrew its proposal to the AMO. To date, the Employer has not implemented its proposal to create the Deck Utility position.

Contentions of the Parties

The Employer contends that the duties of Engineers and Deckhands have been fully integrated and that these jobs have essentially merged. According to the Employer, the two positions have a clear community of interest, and there is no basis for separate representation by two unions. The Employer further contends that in light of its conceptual agreement with the SIU to create a Deck Utility position combining the duties of the Deckhands and Engineers, the SIU is claiming the work, and there is a question concerning representation warranting an election in the unit proposed in its petition. In support of its position, the Employer relies primarily on *The Pulitzer Publishing Company*, 203 NLRB 639 (1973), in which the Board found a question concerning representation following a merger of two positions into a single job combining the functions of both positions.

The Unions Involved contend that the Engineer and Deckhand positions have not merged but remain separate. Accordingly, the Unions Involved contend that there is no question concerning representation. The Unions Involved further assert that they have not demanded recognition in the unit proposed in the petition and that the petition should not be processed.

Analysis and Conclusions

Pursuant to Section 9(c)(1) of the Act, an RM petition is appropriate when: (1) the employer is faced with organizational or recognition picketing without a petition having been filed; (2) the employer is confronted with a demand for exclusive recognition or faced with conflicting representation demands in the unit alleged as appropriate; or (3) the employer has a good faith doubt as to the Union's continued majority support within the unit it already represents.⁵ *United States Postal Service*, 256 NLRB 502, 503 (1981). If an employer fails to establish that any of these circumstances exist, the Board will find that there is no question concerning representation and will dismiss the petition. The Employer contends that the instant petition is appropriate because SIU is demanding exclusive recognition as the representative of the Deck Utility position.

The Employer has petitioned for a unit consisting of "all nonsupervisory tugboat employees." This unit includes the Mates as well as the Deckhands and Engineers. Although both Unions Involved have engaged in negotiations with the Employer concerning the creation of a Deck Utility position, neither union has demanded recognition in the unit proposed by the

⁵ The Board recently described the standard for filing an RM petition in these circumstances as "good faith uncertainty" that a majority of the unit employees continue to support the union. *Levitz Furniture*, 333 NLRB No. 105 (2001).

Employer. As the record contains no evidence that the Unions Involved ever expressed an interest in representing all of the Employer's nonsupervisory tugboat employees, the Employer has not been confronted with an exclusive or conflicting demand for recognition. Consequently, there is no question concerning representation, and the petition is inappropriate.

Moreover, contrary to the Employer, there has not been a "de facto merger" of the Deckhand and Engineer positions. The Employer has expressed an interest in combining these positions, but it has not yet combined them. Rather, the Deckhands and Engineers continue to perform the respective responsibilities of their positions. Deckhands and Engineers perform some common functions, including cooking and operating the lines. They also work together at times, as do all members of the small crews on the Employer's vessels. In other respects, however, the Engineer is a higher-level position than the Deckhand. Thus, the Engineers are primarily responsible for operating the vessel's engine and handle the more difficult maintenance and repair work. In contrast, the Deckhands perform less complicated tasks, such as cleaning the boat. Although the Deckhands have at times substituted for Engineers, the record does not indicate that this practice is widespread, and the Deckhands will only serve as Engineers if the Employer is unable to secure a licensed Engineer from the AMO hiring hall or a substitute from its own off-duty Engineers. Unlike the Deckhands, who need only a Merchant Mariners Document, the Engineers must have a Chief Engineer license.⁶

Pulitzer Publishing, supra, the case on which the Employer primarily relies, is distinguishable. In that case, one union (the Guild) represented a unit of employees that included news writers, while another union (AFTRA) represented a unit of radio announcers who read the scripts prepared by the news writers. When several announcers started writing their own scripts, the parties agreed that these employees (staff newsmen) would become members of both unions and would simultaneously be covered under separate collective bargaining agreements. After a few years, this arrangement proved problematic for the Employer, because the employees and the two unions repeatedly advanced conflicting claims under the two agreements. The Employer then filed an RM petition seeking a unit of the staff newsmen. The Board held that the parties' collective bargaining agreements with the employer did not constitute a contract bar and that a question concerning representation existed, based on AFTRA's letter to the employer claiming exclusive representation of the disputed employees. In its decision, the Board emphasized the inherent difficulties involved in the administration and implementation of two different contracts for the same group of employees. In the instant case, unlike *Pulitzer Publishing*, the Deck

⁶ Since the positions have not merged, the Employer's contention that Unions Involved are claiming the same work is incorrect. Compare *International Brotherhood of Operating Engineers, Local 542, AFL-CIO (Caldwell Tanks, Inc.)*, 338 NLRB No. 61, slip op. at 3 (Nov. 15, 2002) (claim for work in context of Section 8(b)(4)(D) established by group of employees performing the work). Rather, SIU claims the Mate and Deckhand work while the AMO claims the Engineer work.

This case is distinguishable from *Hooker Electrochemical Co.*, 116 NLRB 1393 (1956), cited by the Employer. In *Hooker*, two unions representing the same classifications of employees at two nearby facilities both claimed to represent some or all of the employees in those classifications after the employer combined the operations of the facilities. The Board found the resulting operation comparable to a new operation and decided that stable labor relations would most likely result if the employees from both facilities were combined into a single unit. The Board therefore ordered an election. In this case, in contrast, the two positions have not merged, the Employer not begun to implement the Deck Utility position, and the Unions Involved have not issued competing demands for recognition of the same employees.

Utility position has not yet been created,⁷ the Deckhands and Engineers are separate positions covered under separate collective bargaining agreements, the Employer has not demonstrated that it has faced any contract administration problems, and neither union has made an exclusive claim for the work. Moreover, the employer in *Pulitzer Publishing* petitioned for an election in a unit comprised *only* of the staff newsmen, unlike the instant case, in which the Employer seeks to include the Mates with the Deck Utility employees in a future bargaining unit. Accordingly, I find that *Pulitzer Publishing* does not control this case. Inasmuch as there is no demand for recognition in the unit sought by the petition, I find that there is no question concerning representation, and I shall dismiss the petition. *United States Postal Service*, supra; *LTV Aerospace Corporation*, 170 NLRB 200 (1968);⁸ *The Housatonic Public Service Company*, 111 NLRB 877 (1955).⁹

DECISION AND ORDER

IT IS HEREBY ORDERED that the petition be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **December 11, 2002**.



Dated November 27, 2002

at Philadelphia, PA

/s/

DANIEL E. HALEVY

Acting Regional Director, Region Four

420-2360

⁷ Because it has not yet created the Deckhand Utility position, the Employer has not shown the existence of a *present* demand for recognition sufficient to support further processing of its RM petition. See *The New Otani Hotel & Garden*, 331 NLRB 1078 (2000); *Rapera, Inc.*, 333 NLRB No. 150 (2001).

⁸ In that case, the employer had been awarded a contract by NASA to provide maintenance services at a NASA facility, in place of three separate contractors that had previously performed this work using employees represented by 14 different unions in seven bargaining units. The employer filed a petition seeking to replace the seven units with a single unit. The Board found, however, that none of the unions representing the employees had ever sought to represent all of the employees in the employer's proposed unit. Consequently, the petition was dismissed on the ground that a question concerning representation did not exist regarding these employees.

⁹ In view of the dismissal of the petition, it is unnecessary to consider SIU's further contention that if the petition is processed, only the two Unions Involved should be listed on the ballot.

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